Abdo W. FACAS, Appellant,

v.

UNITED STATES POSTAL SERVICE, Agency.

BN07528710024.

Merit Systems Protection Board.

Nov. 19, 1987.

John J. Nazzaro, Reardon Law Firm, New London, Conn., for appellant.

James R. Ambrogio, New Haven, Conn., for agency.

Before LEVINSON, Chairman, JOHNSON, Vice Chairman, and DEVANEY, Member.

OPINION AND ORDER

This case is before the Board on the agency's petition for review and the appellant's cross-petition for review of an initial decision of the Board's Boston Regional Office that mitigated the appellant's removal to a sixty-day suspension. For the reasons discussed below, we GRANT the agency's petition for review under 5 U.S.C. § 7701(e)(1), DENY the appellant's cross-petition for review under 5 C.F.R. § 1201.115, and AFFIRM the initial decision as MODIFIED by this Opinion and Order. The agency's action removing the appellant from his position is SUSTAINED.

BACKGROUND

The appellant was removed from his position of Distribution Clerk based on a charge that he threatened the life and well-being of a postal official. The specifications in support of this charge alleged that on August 28, 1986, the appellant stated to a fellow employee that he was going to butcher the postmaster, and that on August 26, 1986, the appellant stated to the same employee that he was going to kill certain other people in the post office. The appellant appealed the removal action to the Board's Boston Regional Office. In his appeal, the appellant alleged that the agency's action was based on discrimination due to his handicapping condition (mental condition).

In an initial decision dated March 20, 1987, the administrative judge mitigated the agency's action removing the appellant to a sixty-day suspension. She found that the agency proved by preponderant evidence its charge that the appellant had threatened the life and well-being of a postal official, disciplinary action would promote the efficiency of the service, and the appellant failed to meet his burden of proof with regard to his affirmative defense of handicap discrimination. She further found, however, that removal exceeded the bounds of reasonableness under the circumstances of this case.

In its petition for review, the agency argues that the administrative judge erred in finding that the penalty of removal exceeded the bounds of reasonableness for the sustained misconduct charge. In support of its argument, the agency asserts that it considered the mitigating factors in this case, but determined that removal was an appropriate penalty for the sustained charge. The agency further asserts that the administrative judge improperly substituted her judgment for that of the agency when she determined to impose a lesser penalty.

In his cross-petition for review, the appellant contends that the administrative judge erred in sustaining the charge because she misapplied the standard set forth in *Metz v. Department of the Treasury*, 780 F.2d 1001 (Fed.Cir.1986), when she determined that the statements the appellant made were threats. In support of his contention, the appellant argues that the testimony of Mr. Pinckney, to whom the remark was made, that he believed the appellant's threat, was not credible in light of his testimony that the appellant had made threats in the past and he did not take them seriously. He further argues that the testimony from Mr. Brophy, the Postmaster, was not credible either.

ANALYSIS

The administrative judge did not err in finding that the appellant threatened the life and well being of the postmaster.

[1] In *Metz*, 780 F.2d at 1002, the court directed the Board to consider the following evidentiary factors in deciding whether an employee threatened his supervisors or coworkers: (1) The listener's reaction; (2) the listener's apprehension of harm; (3) the speaker's intent; (4) any conditional nature of the statements; and (5) the attendant circumstances. In the initial decision, the administrative judge considered these evidentiary factors and determined that the agency established that the appellant's statements were threats. We agree with her determination.

In support of her finding that the agency proved the charge by preponderant evidence, the administrative judge found that the appellant admitted that he made the remark that he would butcher the postmaster. She further found that: (1) Mr. Pinckney went to the postmaster and reported the remark to him; (2) when the incident was reported to Mr. Brophy, he requested that Mr. Pinckney give a written statement, he called the management section manager to report the incident to the postal inspectors, and he then isolated himself in his office to avoid any contact with the appellant; and (3) the day after the incident, Mr. Brophy placed the appellant on an emergency suspension, had him escorted off postal service premises, instructed his supervisors that if the appellant came to

work they were to call the police, and he went to the police department, filed a report and requested that a police cruiser be in the area at the time the appellant was scheduled for work. She also found that both Mr. Brophy and Mr. Pinckney believed the threat, and their objective actions indicated that they were both alarmed by the remark. Additionally, the administrative judge found that the circumstantial evidence showed that the appellant's intent was to carry out the threat, at least when made, there were no conditions placed on the remark, and the surrounding circumstance that the appellant had just had a confrontation with Mr. Brophy did not justify the remark. On the basis of the record as a whole, the administrative judge concluded that the appellant had threatened Mr. Brophy. We find no error in this determination.

In *Metz*, 780 F.2d at 1003, the court further directed the Board "to give objective evidence heavy weight" and to apply a "reasonable person criterion by considering what reasonable persons who heard the statement actually did." The objective evidence *i.e.*, the actions of both Mr. Pinckney and Mr. Brophy, shows that the appellant did threaten Mr. Brophy. Further, there is subjective evidence of fear on the part of Mr. Pinckney and Mr. Brophy. Both testified at the hearing that they were alarmed by the appellant's remark. Therefore, we agree with the administrative judge's finding that the agency proved by preponderant evidence that the appellant threatened a postal official.

The appellant's argument on petition for review merely disputes the administrative judge's findings and does not provide a sufficient basis to set aside her credibility determinations. *See Weaver v. Department of the Navy*, 2 MSPB 297, 2 M.S.P.R. 129, 133 (1980), *aff'd*, 669 F.2d 613 (9th Cir.1982) (Board must necessarily give due deference to the credibility findings of the administrative judge). The appellant has failed to establish that the administrative judge's factual findings and credibility determinations rested on internal inconsistencies or inherent improbabilities. Therefore, his argument presents no basis for review.

The administrative judge erred when she determined that the penalty of removal was unreasonable under the circumstances of this case.

The Board will review an agency's penalty selection to assure that the agency struck a responsible balance within the tolerable limits of reasonableness. *See Douglas v. Veterans Administration*, 5 MSPB 313, 5 M.S.P.R. 280, 306 (1981). The Board will not disturb an agency's penalty if it is the maximum reasonable penalty which may be imposed after considering all of the relevant factors. *See Davis v. Department of the Treasury*, 8 MSPB 17, 8 M.S.P.R. 317, 320–21 (1981). Moreover, in making such a determination, the Board must give due weight to the agency's primary discretion in

exercising the managerial function of maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibilities but to assure that managerial judgment has been exercised within the tolerable limits of reasonableness. *See Douglas*, 5 M.S.P.R. at 302; *Gibbs v. Department of the Army*, 33 M.S.P.R. 261, 263 (1987). We find that the administrative judge erred in determining that the penalty of removal was not within the bounds of reasonableness.

[2] In support of her finding that the penalty of removal was not appropriate in this case, the administrative judge found that the appellant had been employed by the agency for sixteen years with no past disciplinary record, and that another employee had only been suspended for an act of actual physical violence.[1] She further found that the appellant had been making threatening remarks throughout his career with the agency yet he had never once been counseled or disciplined for this behavior.[2] She therefore concluded that a sixty-day suspension was the maximum reasonable penalty under the circumstances of this case and that the penalty would serve as a warning that making threats is serious and would not be tolerated by the agency in the future.

In its decision letter dated October 26, 1986, the agency considered, as mitigating circumstances, that the appellant has many years of federal service, that another employee had assaulted a supervisor and received a less serious penalty, and that the appellant had a personality conflict with Mr. Brophy.[3] The deciding official determined, however, that the appellant's length of service was not sufficient to overcome the penalty of removal because the threat to take someone's life is a serious offense. The deciding official further determined that the other employee's offense did not reach the level of a life threatening situation and that Mr. Brophy's treatment of the appellant was not out of the bounds that would be expected in a supervisor/employee relationship. *See*

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1. With regard to this incident, the administrative judge found that another employee had grabbed a supervisor and pushed him up against the wall. This employee received a short suspension. The supervisor testified at the hearing that a suspension had been recommended by the postal inspector because the employee had been provoked by the supervisor. *See* Initial Decision (I.D.) at 12.

2. In this regard, the administrative judge found that the agency's past inaction may be explained by the fact that the appellant's father was the supervisor of all of the management officials at the facility until April 1986, and that they did nothing to the appellant because his father held their careers in his hands. *See* I.D. at 12.

3. The appellant also raised as a mitigating circumstance that a recent tragedy that had occurred in Oklahoma was causing the penalty and not his actions. In the decision letter, the deciding official stated that event had no bearing on the agency's decision to remove the appellant. *See* Appeal File, Tab 14, Exhibit 10.

Appeal File, Tab 14; Exhibit 10. At the hearing, the deciding official testified that he decided removal was an appropriate penalty notwithstanding the mitigating factors because the agency cannot have an environment where an employee threatens the life of another employee, and that the appellant's years of service could not outweigh the seriousness of this offense. *See* Hearing Tape 5.

An agency is only required to show that the penalty it selected is reasonable—it is not required to show that the penalty selected is the best penalty. *See Martinez v. Department of Defense*, 21 M.S.P.R. 556, 558 (1984), *aff'd*, 765 F.2d 158 (Fed.Cir.1985). We find that the agency has shown that the penalty of removal is reasonable under the circumstances of this case. Contrary to the administrative judge's finding, we find that the appellant's years of service and lack of a past disciplinary record do not outweigh the seriousness of the offense. Similarly, the absence of prior warning to the appellant that a threat of death to a supervisor would not be tolerated renders his misconduct no less blameworthy where it so clearly represents proper grounds for removal. Moreover, the agency has shown that the incident where another employee assaulted his supervisor was sufficiently different from the appellant's misconduct to show that the principle of like penalties for like offenses was not violated in this case.

ORDER

Accordingly, the initial decision is AFFIRMED as MODIFIED by this Opinion and Order and the agency's action removing the appellant is SUSTAINED.

This is the final order of the Merit Systems Protection Board in this appeal. *See* 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have one of several alternatives to choose from if you want further review of this decision.

Discrimination Claims

You may petition the Equal Employment Opportunity Commission (EEOC) to consider the Board's decision on your discrimination claims, and still preserve any right you may have to judicial consideration of your discrimination claims or your other claims. 5 U.S.C. § 7702(b)(1). The address of the EEOC is 5203 Leesburg Pike, Suite 900, Falls Church, Virginia 22041. The law is unsettled regarding the time limit for filing where a party is represented. Therefore, you must file a petition with the EEOC no later than thirty days after receipt of this order by you or your representative, whichever occurs first. 5 U.S.C. § 7702(b)(1).

If you do not petition the EEOC for consideration of the Board's decision on your discrimination claims, or if you do petition the

EEOC and it affirms the Board's decision in your appeal, you may choose to file a civil action on both your discrimination claims and your other claims in an appropriate United States district court. 5 U.S.C. § 7703(b)(2). The law is unsettled regarding the time limit for filing where a party is represented. Therefore, if you elect to file a civil action without first petitioning the EEOC, you must file a petition with the district court no later than thirty days after receipt of this order by you or your representative, whichever occurs first. 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to request waiver of any requirement of prepayment of fees, costs, or other security. 42 U.S.C. § 2000e–5(f); 29 U.S.C. § 794a.

Other Claims

If you choose not to seek review of the Board's decision on your discrimination claims, you may petition the United States Court of Appeals for the Federal Circuit to review the decision on issues other than prohibited discrimination, if the court has jurisdiction. 5 U.S.C. § 7703(b)(1). The address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The law is unsettled regarding the time limit for filing where a party is represented. Therefore, you must file a petition with the court no later than thirty days after receipt of this order by you or your representative, whichever occurs first. 5 U.S.C. § 7703(b)(1).

DEVANEY, Member, dissents without opinion.

For the Board:
ROBERT E. TAYLOR,
WASHINGTON, D.C.